V PRAZE DNE 9. LISTOPADU 2020

The text is a step backward compared to the flexibility for lawful processing and other provisions we have been advocating in alignment with the industry's concerns and were included in the two previous EU Council drafts.

1/ The **authorities to regulate the e-privacy** will be framed by provisions on independence as set in art. 51 to 54 of the GDPR (see art. 18): it is not enough and **there should be explicit recognition of the One-Stop-Shop laid down in the e-privacy.**

2/ **Article 8 needs to be reconsidered. The fundamental purpose of the article should be to address "cookie rule" issues today, consent fatigue and a lack of certainty about how the cookie rules relate to the GDPR in practice and to give internet users control**. The proposal to narrow down the exception to consent where cookies are "technically" necessary to provide services "explicitly" requested by the end user, in particular, needs rethinking. An "explicit request" just goes back to a "consent" collateral mechanism, narrowing the exception so much that it overlaps with the consent requirement.

3/ **Article 6a(2) should be removed. Two consenting internet users or more should be able to consent to a third party using their communications content if they want to without any further impact assessment**. The wording is also not clear and reference could be implicitly made to a DPIA obligation as set in article 35 of the GDPR (or not). Reference to a prior consultation is neither needed nor proportionate to individual risks, as those provided consent.

4/ A **class action/mandate to represent individuals to defend their rights** is integrated(Art 4a: "*1a. Paragraph 1 is without prejudice to national legislation on determining the persons who are authorised to represent a legal person in any dealings with third parties or in legal proceedings*.") the same way it was laid down in the GDPR (art 80). Nevertheless, GDPR have a set of consistent rules across EU but there are no agreements from a Member State to another on e-privacy concrete implementation (i.e. position on cookies diverge, statistical counting, compatible further use of data). This will for sure creat legal uncertainty, specifically for companies providing cross-border services in EU.

5/ **Legitimate interest and further compatible use are kept out** of the exceptions on the prohibition to process electronic communication data. Therefore, there would be situations in which the "closed" cases identified might not be covered and it will be problematic (i.e. latest provisions on broadcasted contents regarding **end-user terminal equipment** - see art. 8). Also, to address consent fatigue, legitimate interest really should be re-inserted into Article 8, maybe together with a requirement that customers always have an opt-out option.

TELEFON (+420) 225 279 111 | E-MAIL SPCR@SPCR.CZ
WEB WWW.SPCR.CZ | ADRESA FREYOVA 948/11, 190 00 PRAHA 9
ZAPSANÝ VE SPOLKOVÉM REJSTŘÍKU, VEDENÉM MĚSTSKÝM SOUDEM V PRAZE ODDÍL L, VLOŽKA 3148.
IČO: 00536211, DIČ: CZ00536211.

7/ **Statistical counting** is maintained with strict conditions (see art 6b(e)) that might trigger discrepencies in the way EU DPAs regulators in charge implement & enforce, which is a concern (as much as for anonymization).

8/ **Recital 20 does seem to go beyond the protection of individual privacy: it builds on the cookie wall narrative that CNIL pushed for in 2020 and that was sanctioned by French Supreme Court** (CE, 19 June 2020) as going beyond GDPR requirements. Determining whether it might be invalid to set up a cookie wall is something that was not validated in any way, in particular where reference is made to how the ban on cookie walls would apply "*for websites providing certain services, such as those provided by public authorities*" or where the website can't do this if the end-user "*has only few or no alternatives to the service*". Such assessments prove to be so vague that they would trigger inacceptable legal insecurity.

9/ **Recital 21** rule that consent is systematically needed to use identifier cookies does trigger the consent fatigue glitches flagged before.

10/ Compromise text that amounts to a devastating retrograde step in the negotiations, as it does not include a clear, predictable and harmonised legal basis for the generation of data insights from mobile location data.

Most disappointingly, the Presidency text fails to learn from the lessons of the Coronavirus crisis, where governments utilised aggregate and anonymised data from mobile networks to inform and monitor public health strategies vital to containing the virus. Data insights were critical in this instance in helping governments to save lives and soften the economic damage wrought by the virus.

We urge to reject proposed changes that would shackle ability to generate valuable data insights, as evident in the German Presidencies latest compromise proposal and work towards a more flexible and forward-looking legal instrument.